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February 21, 2008

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VIA FEDERAL EXPRESS

Surface Transportation Board
395 E Street. S W
Washington, DC 20024

Re **In the Matter of Arbitration Between Union Pacific Railroad Company and Brotherhood of Locomotive Engineers and Trainmen, New York Dock Finance Docket No. 32760, SUB-FILE 45 (Arbitration Review)**

To Whom It May Concern

Enclosed please find an original and 11 copies of (1) Carrier's Appeal from Arbitration Award, (2) Appendix of Exhibits, and (3) Motion for Leave to Exceed the Page Limit, to be filed in the above-referenced matter Please return a file stamped copy to us of each filing in the enclosed self-addressed stamped envelope for our files Also enclosed is the $150 filing fee for this matter

If you have any questions, please feel free to give me a call

Very truly yours,

Thompson Coburn LLP

By
Clifford A Godiner

Enclosures

cc Gilbert Gore

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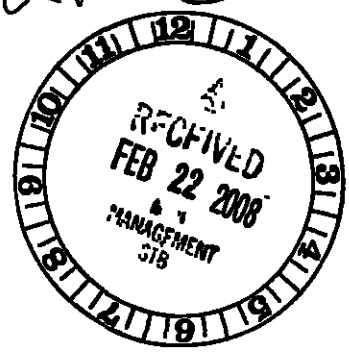

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO 32760, SUB-FILE 45

IN THE MATTER OF ARBITRATION BETWEEN UNION PACIFIC RAILROAD COMPANY AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN

(Arbitration Review)

APPEAL FROM ARBITRATION AWARD

Respectfully submitted,

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INTRODUCTION

Beginning in 1971, Union Pacific Railroad Company ("UP") and the nation's other major railroads bargained for critical rights to change train runs and terminal switching limits to enhance the efficient movement of freight New national agreements were negotiated with labor organizations today known as the Brotherhood of Locomotive Engineers and Trainmen ("BLET") and the United Transportation Union ("UTU"), permitting UP to make these operational changes without union consent. Instead, under these agreements, UP simply serves notice of its desire to change train runs or extend switching limits, and the unions are required to negotiate terms and conditions governing that service. Most important, failing agreement, an arbitrator imposes terms and conditions for the extended switching limits or the modified train runs (referred to in these national agreements as "interdivisional service")

Since 1971, these rights have become more and more critical to UP The ability to extend switching limits and to alter train runs allows UP to respond to changing traffic patterns and to efficiently operate its rail system Thus, in 1986, a new national agreement was negotiated that accelerated UP's right to create new interdivisional service Under current agreements (Article IX of the 1986 Agreement for interdivisional service and Article II of the 1971 Agreement for extending switching limits), UP can quickly implement these changes, often with 20 days notice Absent such rights, UP would be forced to gain union consent for all of these changes through the "almost interminable" major dispute resolution process of the Railway Labor Act ("RLA") Detroit & Toledo S L R R v United Transp Union, 396 U.S 142, 149 (1969) [1] The public interest in the efficient movement of goods in commerce would be threatened

[1] Specifically, UP would be required to serve a § 6 notice on BLET and UTU The parties would then engage in a lengthy series of negotiations, both direct and mediated If no agreement was reached, a Presidential Emergency Board could be convened to make recommendations to resolve the dispute In the end, the parties would either

This appeal presents a significant and recurring question of whether UP voluntarily gave up these critical rights when it entered into 16 New York Dock ("NYD") Merger Implementing Agreements with BLET following UP's merger with the Southern Pacific Transportation Company ("SP").[2] Each Merger Implementing Agreement governs a different "hub" in UP's transportation system. Each Merger Implementing Agreement sets forth UP's original post-merger operating system in that hub, establishing train runs that engineers operate over, creating pools of engineers who operate those runs, detailing how seniority is established for each pool, establishing home and away-from-home terminals for those runs, and setting terminal switching limits within the hub Each Merger Implementing Agreement also provides that prior national collective bargaining agreements remain in effect except as specifically modified therein

Consistent with long-standing practice, BLET understood that the Merger Implementing Agreements did not modify or nullify UP's rights to establish new interdivisional service and to extend switching limits Indeed, following execution of the Merger Implementing Agreements, UP repeatedly used the expedited procedures contained in the 1986 and 1971 Agreements to establish new interdivisional service and to extend switching limits See Table 1, infra, at 13-15 In each instance, the negotiated or arbitrated agreement modified some provision of a Merger Implementing Agreement

In March 2004, however, Arbitrator Ann Kenis issued an award (the "Kenis Award") under Article I, § 11, of NYD that dramatically threatens UP's ability to efficiently move freight

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reach an agreement, or UP would be required to endure a strike if it wished to implement new interdivisional service or to extend switching limits 396 U S at 149 n 14 Thus, the relevant national agreements not only serve the purpose of allowing the railroad to operate efficiently, they avoid the specter of work stoppages that would have devastating impacts on commerce

[2] Also at issue is a Merger Implementing Agreement entered into following UP's merger with the Chicago & N W Ry Co

through its system In an inherently self-contradictory award, Arbitrator Kenis first found that the Merger Implementing Agreements for the North Little Rock, Kansas City, and St Louis hubs **did not** modify or nullify UP's Article IX rights. In the next paragraph, however, Arbitrator Kenis found that the Merger Implementing Agreements **did** modify those rights, in that they precluded UP from using the expedited procedures of Article IX to establish new interdivisional service that would change any provision of any Merger Implementing Agreement

These findings are inconsistent and cannot be reconciled UP's fundamental "right" under Article IX is the right to an expedited procedure to change existing agreements to establish new interdivisional service UP has used these expedited procedures numerous times to change Merger Implementing Agreements it has entered into with BLET Arbitrator Kenis' finding that UP could not use the expedited procedures of Article IX to change a Merger Implementing Agreement to establish interdivisional service modified that right, and therefore directly contradicts her earlier finding that the Merger Implementing Agreements did not modify UP's rights under Article IX Moreover, because every new interdivisional service will modify some provision of the affected Merger Implementing Agreement, the Kenis Award effectively nullified UP's Article IX rights altogether. Thus, regardless of the needs of commerce, UP is not allowed, under the Kenis Award, to change its operations to more efficiently move freight

In the immediate aftermath of the Kenis Award, BLET took the position that the Kenis Award's logic only applied in three specific hubs, and not on the rest of the UP system Not only did BLET advance this argument to this Board, it continued to enter into agreements with UP to establish new interdivisional service that modified existing Merger Implementing Agreements. BLET also argued for a narrow application of the Kenis Award in a brief filed with the Seventh Circuit Court of Appeals in a case against UP.

Recently, however. BLET's position has radically changed In 2007, BLET argued in two separate arbitrations that the Kenis Award should be applied broadly throughout the UP system. First, BLET argued that the Kenis Award precluded UP from extending switching limits under Article II of the 1971 Agreement in the Los Angeles hub. Shortly thereafter, in another arbitration, BLET argued again that, per the Kenis Award, UP was precluded from establishing new interdivisional service in its Houston hub.

These arbitrations resulted in inconsistent awards Arbitrator John Binau, interpreting the Los Angeles Merger Implementing Agreement, concluded that the Agreement did not modify or nullify UP's right to make changes to that agreement and extend switching limits under the 1971 Agreement. Thus, Arbitrator Binau permitted UP to change the terminal limits set forth in the Los Angeles Merger Implementing Agreement BLET has not appealed the Binau Award In contrast, Arbitrator Robert Perkovich, relying on the Kenis Award, concluded that UP was prohibited from establishing new interdivisional service in its Houston hub.

UP now respectfully asks this Board to review the Perkovich Award (attached hereto as Exhibit 1) and to resolve the conflicting positions taken by these arbitrators regarding the meaning of the various Merger Implementing Agreements While their exact language may differ slightly, all of the Merger Implementing Agreements in effect between UP and the BLET recognize that the 1971 and 1986 Agreements (and other national agreements) continue to apply unless specifically modified by the relevant Merger Implementing Agreement. As a result, BLET has objected, and undoubtedly will continue to object, to any proposal by UP to extend switching limits, establish interdivisional service, or make any other operational changes permitted by national agreements in all territories covered by any of the Merger Implementing

Agreements Board resolution is necessary to resolve this important issue and to insure that UP is able to efficiently move freight throughout its rail system

FACTS

A. The Merger Implementing Agreements

In August 1996, the Surface Transportation Board (the "Board") approved the merger of the Union Pacific Corporation and its affiliated carriers, and the Southern Pacific Transportation Co and its affiliated carriers Union Pac Corp – Control and Merger – Southern Pac Transp Co , 1 S.T.B 233 (1996) As required by 49 U.S.C. § 11326, the Board's approval mandated that employees adversely affected by this merger receive the protections of NYD, set forth in New York Dock Ry – Control – Brooklyn E Dist , 360 I.C C 60, aff'd sub nom New York Dock Ry v United States, 609 F.2d 83 (2nd Cir 1979)

Following the UP/SP Merger, UP rearranged its operations into a "hub and spoke" system A series of hubs were established, with runs (spokes) emanating from each hub. Pursuant to Article I, § 4, of NYD, UP and BLET negotiated 16 separate Merger Implementing Agreements for these hubs between 1996 and 2001 [3] In addition, UP and BLET are parties to a NYD Merger Implementing Agreement imposed by arbitration following the merger of the UP and Chicago & North Western Railway Company ("CNW"), which is still largely applicable in the Chicago area and in other parts of the upper Midwest. A complete list of the Merger Implementing Agreements in effect at this time is attached hereto as Appendix A, the relevant sections of these Agreements are attached hereto as Exhibits 2-18

[3] UP is also party to a Merger Implementing Agreement with the UTU for each of these hubs

1. The Relevant Language of the Merger Implementing Agreements

As discussed above, the Merger Implementing Agreements between UP and BLET set forth the original post-merger operations for that hub, including the runs that engineers would operate over, the home and away-from-home terminal locations, and the switching limits for that hub's terminals E.g., Ex 3, at 2-16, Ex 4, at 2-8 In addition, each Merger Implementing Agreement identifies which pre-existing collective bargaining agreements, sometimes called "system" or "schedule" agreements, continue to apply to the engineers at that hub E.g., Ex 3, at 20, Ex 4, at 8 While the specific agreements that govern the engineers differs from hub to hub, all of the Merger Implementing Agreements between the UP and BLET recognize that national agreements (including the 1986 and 1971 Agreements) continue to apply, except where specifically modified by the Merger Implementing Agreement

The idea that the national agreements continue in force except where specifically modified by the Merger Implement Agreement is stated in two different ways in the 16 UP/SP Merger Implementing Agreements Nine of the 16 Merger Implementing Agreements provide for this result in a provision entitled "Agreement Coverage," which states

> Engineers [or, in some cases, employees] working in [this] Hub shall be governed, in addition to provisions of this Agreement, by the Collective Bargaining Agreement selected by the [UP], including all addenda and side letter agreements pertaining to that agreement and previous National Agreement/ Award/Implementing Document provisions still applicable Except as specifically modified herein, the system and national collective bargaining agreements, awards and interpretations shall prevail [4]

The remaining seven Merger Implementing Agreements use different language to reach the same result First, these Agreements contain a "Savings Clause," which states that "[t]he

[4] As shown in Appendix B, this language appears in the Dallas/Ft Worth ("DFW"), Denver, Los Angeles, Roseville, Salt Lake City, San Antonio, and Southwest Hub Merger Implementing Agreements, as well as both Portland Merger Implement Agreements Exs 3, 4, 8, 11, 12, 13, 15, 16, 17 (emphasis added)

provisions of the applicable Schedule Agreement will apply unless specifically modified herein." Second, these seven Agreements contain the following provision entitled "Applicable Agreements":

> All engineers [or, in some cases, employees] and assignments in the territories comprehended by this Implementing Agreement will work under the Collective Bargaining Agreement currently in effect between the [UP] and the [BLET] dated [appropriate date] . including all applicable national agreements, the "local/national" agreement of May 31, 1996, and all other side letters and addenda which have been entered into between the date of last reprint and the date of this Implementing Agreement Where conflicts arise, the specific provisions of this Agreement shall prevail [5]

A table summarizing the relevant language of each Merger Implementing Agreement is attached hereto as Appendix B

Although these two formulations use different words, they express the same concept· the selected pre-existing collective bargaining agreements, including the 1971 and 1986 Agreements, remain in effect except where specifically modified by the Merger Implementing Agreement Thus, these provisions accomplish a fairly straightforward purpose, insuring that claims were not forwarded by employees under the prior surviving agreements that were inconsistent with specific terms of the new Merger Implementing Agreements However, except where **specifically** modified, the prior agreements remained in effect.

2. *The History of Conflict Language in Merger Implementing Agreements*

Similar language is found in other Merger Implementing Agreements between UP and the BLET. In 1986, following the merger of UP and Missouri Pacific Railroad, UP and BLET entered into several NYD Implementing Agreements that contain language very similar to that

[5] As shown in Appendix B, this language appears in the Kansas City, Longview, Salina, North Little Rock, and St Louis Hub Merger Implementing Agreements, as well as both Houston Merger Implementing Agreements Exs 5, 6, 7, 9, 10, 14, 18 (emphasis added) In addition, similar language is found in the UP/CNW Merger Implementing Agreement Ex 2, at 29

found in the Merger Implementing Agreements at issue herein. For example, Article XI(a)(1) of the August 3, 1983, UP/MP Merger Implementing Agreement for the Omaha/Council Bluffs terminal, Ex 19, at 6, provided "Savings Clause. Where the rules of the UP/BLE Schedule Agreement conflict with this Agreement, this Agreement shall apply." Likewise, Article V of the July 19, 1984 UP/MP Merger Implementing Agreement for the Hastings, Nebraska, terminal, Ex. 20, at 4, provided that "Savings Clause Where the rules of the UP/BLE Schedule Agreement conflict with this Agreement, this Agreement shall apply." See also Article XI(a)(1) of the August 3, 1983 UP/MP Merger Implementing Agreement for the Kansas City terminal, Ex 21, at 7, Article V of the January 17, 1985 UP/MP Merger Implementing Agreement for the Beloit, Kansas, terminal, Ex 22, at 4.

Similar agreements were also negotiated following UP's merger with the Missouri-Kansas-Texas Railroad ("MKT"). For instance, Article V of the December 9, 1988, UP/BLE Merger Implementing Agreement, Ex 23, at 14, provides "Savings Clause· Where the rules of the Schedule Agreement conflict with this Agreement, this Agreement shall apply." Like the UP/SP Merger Implementing Agreements and the UP/CNW Merger Implementing Agreement, these agreements recognize that selected pre-existing collective bargaining agreements, including the 1971 and/or 1986 Agreements, remain in effect except where specifically modified by the Merger Implementing Agreement

B. The 1986 and 1971 National Agreements

This appeal involves provisions in two national agreements between the UP and BLET that continue to apply to engineers Article IX of the May 19, 1986, BLET National Agreement ("1986 Agreement"), Ex 24, and Article II of the May 13, 1971, BLET National Agreement ("1971 Agreement"), Ex 25 These provisions create an expedited process through negotiation

and (if necessary) arbitration, allowing UP to modify existing agreements to establish new interdivisional service (the 1986 Agreement) or to extend terminal switching limits (the 1971 Agreement) The history underlying these important carrier rights is set forth below.

1. The History of Interdivisional Service and Extending Switching Limits

In 1952, BLET entered into agreements with the nation's railroads creating a procedure for the negotiation of new interdivisional service and extensions of terminal switching limits. Articles IV and VII of the May 23, 1952, BLE National Agreement (the "1952 Agreement"), Ex 26. The 1952 Agreement, however, proved to be ineffective. With regard to new interdivisional service, the 1952 Agreement did not contain a self-enforcing mechanism to permit the carriers to establish new service without union consent. Id at 8-9 And, while there was an arbitral mechanism for extending switching limits, that procedure was only available after lengthy, mediated negotiations Id at 9.

The 1971 Agreement cured these deficiencies, establishing an arbitral mechanism to settle disputes over new interdivisional service, and eliminating the lengthy mediated negotiations previously required to extend switching limits Under the 1971 Agreement, if a carrier wishes to make either of these kinds of operational changes, it serves notice of its desire to do so, and the parties then meet on an expedited basis to negotiate the terms and conditions of that new service Failing prompt agreement, however, an arbitrator imposes terms and conditions for the new service Ex 25, at 4, 12.

These rights quickly became extremely important to UP and the railroad industry. As a result, UP (and the other carriers) negotiated to expedite the process for establishing new interdivisional service The result was Article IX of the 1986 Agreement, which shortens the

timelines for negotiating new interdivisional service agreements and permits railroads to implement new interdivisional service on a trial basis in certain circumstances Ex 24, at 18.[6]

Of course, UP's right to establish new interdivisional service and extend switching limits did not come cheaply Both the 1971 and 1986 Agreements provided generous wage increases and cost-of-living adjustments to BLET-represented employees in exchange for UP's right to modify existing collective bargaining agreements through expedited negotiation and arbitration rather than the process set forth in the RLA Ex 28. Moreover, adversely affected engineers were entitled to certain protective conditions (i e , their wages are protected for a number of years against reductions caused by the new service). Ex. 24, at 18-19 Finally, the proposed service has to be reasonable in terms of mileage and hours of work. Ex 24, at 17.

Thus, the 1971 and 1986 Agreements achieve a balance UP is entitled to modify existing agreements to create new interdivisional service or to extend terminal switching limits through a process of expedited negotiation and arbitration In exchange, employees received large wage increases Moreover, UP cannot insist upon unreasonable service, and must protect employees against compensation reductions for a period of years following the implementation of these changes

2. *The Purpose of These Agreements*

All new interdivisional service and switching limits extensions conflict with, and seek to modify, some provisions of the relevant Merger Implementing Agreements The extension of switching limits necessarily modifies existing terminal limits set forth in those Agreements, and the establishment of interdivisional service necessarily modifies the existing routes, home and

[6] In 1991, § 4 of Article IX was amended to add § 4(b), which provides that the carrier and union commit themselves to expedite the negotiation and arbitration process to allow the swift creation of new interdivisional services Ex 27, at 23

away-from-home terminal assignments, and/or pool assignments set forth in those Agreements. These changes in existing agreements are specifically permitted by the 1971 and 1986 Agreements.

The purpose of these Agreements permitting UP to quickly implement new interdivisional service and to extend switching limits is well-established railroads must be able to make expeditious changes to current operations established in existing collective bargaining agreements to improve efficiency These rights exist not for the protection of the railroads, but for the protection of the public's interest in the efficient movement of goods in interstate commerce In its 1962 Report, the Presidential Review Commission ("PRC") specifically recognized that

> The efficient expeditious movement of trains requires as a matter of public interest that machinery be derived under which carriers will be able to propose and eventually secure definitive judgment with respect to the establishment of interdivisional runs

Ex. 29, at 301 (emphasis added). Similarly, with respect to the extension of switching limits, the PRC's 1962 Report recognized that extending switching limits has been used by carriers to "conform to the needs of the service," and provide carriers with a "degree of flexibility in the use of yard crews to service new industries " Ex. 29, at 321-23.

Consistent with the PRC's 1962 Report, arbitrators have repeatedly recognized that new interdivisional service and switching limit extensions are necessary if railroads are to remain efficient, meet customer demands, and remain competitive with other transportation options For instance, in Public Law Board No 1679, Award No 1, Referee A.T. Van Wart, held that.

> The Board finds that the May 13, 1971 BLE National Agreement was designed, in exchange for large wage increases, to remove certain artificial contractual barriers as reflected by the various Rules agreed to therein and to merely improve the efficiency of Carrier's operation

Ex. 30, at 11. Similarly, in Arbitration Board No 586, Referee B E Simon ruled that:

> The entire purpose for establishing interdivisional assignments was to permit carriers to improve the efficiency of their operations by expanding the nature of work that may be performed by road crews and the territory over which they operate

Ex. 31, at 7

To meet these market realities and to keep commerce moving efficiently, UP's rights under these agreements are very broad Although the term "interdivisional service" suggests that it applies only to new operations between divisions (hubs, in UP parlance), the 1971 and 1986 Agreements show that the term has a far broader meaning For purposes of those Agreements, the term "interdivisional service" includes both interdivisional and intradivisional service (service within a single hub), as well as inter-seniority district and intra-seniority district service. Ex 24, at 1. Thus, essentially any new train run that UP wishes to establish will fall within the ambit of Article IX of the 1986 Agreement, allowing UP to efficiently operate its transportation system as required by the needs of shippers and commerce

Although not directly addressed in the arbitration awards at issue, UP also obtained the right to modify existing collective bargaining agreements through an expedited process of negotiation and arbitration in Article IX of the May 31, 1996, BLET National Agreement ("1996 Agreement"), attached as Ex 32 Under Article IX of the 1996 Agreement, UP can alter starting times, yard limits, calling rules, on/off duty points, seniority boundaries, and class of service restrictions in existing agreements through this expedited process in response to a customer request, or where needed to attract or retain customers. Id at 18. Like interdivisional service, these changes, known as "enhanced customer service," may be implemented on a trial basis for

six months If the parties cannot agree on the service after the trial period expires, the matter is submitted to mandatory arbitration for resolution Id at 18-19

C. *UP's Establishment of New Interdivisional and Enhanced Customer Service and Extension of Switching Limits in Territories Covered by Merger Implementing Agreements*

Consistent with and pursuant to the 1971, 1986, and 1996 National Agreements, UP has repeatedly modified its Merger Implementing Agreements to establish new interdivisional service, implement enhanced customer service, and/or extend switching limits to enhance the efficiency of its operations, and/or attract and retain customers Such changes have typically arisen in rapidly growing traffic areas, and in hubs that have experienced increasing delays. On some occasions, UP and BLET have been able to negotiate the terms of the new service or limits On other occasions, the matter was submitted to arbitration Finally, in some instances, UP simply implemented its proposed service pursuant to a notice as permitted by the applicable national agreement

Table 1 lists many of the new interdivisional services, enhanced customer services, and/or switching limit extensions established through negotiation, arbitration, or implementation in a territory covered by a Merger Implementing Agreements, explaining how each of these 16 operational changes modified the existing Merger Implementing Agreement

TABLE 1

Interdivisional Service/Enhanced Customer Service/Switching Limit Extension	Merger Implementing Agreement	Modification to Implementing Agreement
Dallas, TX – Sweetwater, TX (Aug. 26, 2005 Agreement) (Ex 33)	DFW	Modified Art. III(A)(1) & (2) by establishing a run directly from Dallas to Sweetwater, with Dallas as the home terminal

Mason City, IA – Sioux City, IA (July 27, 2004 Agreement) (Ex 34)	UP/CNW	Modified Art II(A)(5)(b) by establishing runs from Mason City to Sioux City and St James
Mason City, IA – St James, IA (March 8, 2006 Agreement) (Ex 35)	UP/CNW	Modified Art II(A)(5)(a) by establishing runs from Twin Cities to Mason City, Iowa Falls, Boone, Sioux City, and Des Moines, IA
Portland, OR – Kalama, WA (Nov. 14, 2002 Agreement) (Ex 36)	Portland Zone 1 & 2	Modified Art III(A) by establishing a new run from Portland to Kalama and creating a new away-from-home terminal in Kalama (if needed)
Longview, TX Switching Limit Extension (March 16, 1998 Agreement) (Ex 37)	Longview	Modified Art. I(B)(8) by extending the eastern switching limit for the Longview terminal from Milepost 88 5 to Milepost 85
Salt Lake City Intermodal Facility Enhanced Customer Service (October 19, 2006 Agreement) (Ex. 38)	Salt Lake City	Modified Art III by permitting UP to run engineers through the Salt Lake City terminal to the Salt Lake City Intermodal facility without switching crews at the Salt Lake City terminal
Toyota Motor Company Enhanced Customer Service (October 19, 2006 Agreement) (Ex. 39)	San Antonio	Modified Art III by permitting UP to run engineers through the San Antonio terminal to Toyota's facility without switching crews in San Antonio
Chicago, IL – Minneapolis, MN (Jan. 19, 2005 Award) (Ex 40)	UP/CNW	Modified Art II(A)(5) by establishing new runs from Chicago, IL to Minneapolis, MN
South Morrill, NE – Bill, WY (Sept. 29, 1998 Award) (Ex 41)	UP/CNW	Modified Art II by establishing new runs from South Morrill, NE, to various coal mines in southern Wyoming
Dolores/ICTF, CA– Yermo, CA (May 27, 2003 Award) (Ex 42)	Los Angeles Hub	Modified Art III(A) by establishing a run from Dolores to Yermo, and creating a new home terminal at Dolores

Beaumont, TX – Livonia, LA (Feb 25, 2000 Award) (Ex 43)	Houston Zones 1 & 2	Modified Art I by establishing Beaumont as new home terminal, modified Art I by creating new pools for Beaumont service, modified Art II(B) by changing meal allowance rules
Ft Worth, TX – Halstead, TX (June 1, 2005 Award) (Ex 44)	DFW	Modified Art III(A)(1) by establishing a run directly from Ft Worth to Halstead (a new away-from-home terminal)
El Paso, TX – Pecos, TX (May 16, 2000 Notice) (Ex 45)	Southwest/DFW	Modified Art III of the Southwest Hub Agreement by establishing a run directly between El Paso and Pecos (a new away-from-home terminal)
South Pekin, IL – Chicago, IL (Aug. 17, 2000 Notice) (Ex 46)	UP/CNW	Modified Art II(A)(5)(d) & (e) by establishing a run directly between South Pekin and Chicago
West Colton – El Centro (July 20, 2005 Notice) (Ex. 47)	Los Angeles	Modified Art III by establishing a run directly between West Colton and El Centro (a new away-from-home terminal)
AmerenUE Enhanced Customer Service (June 27, 2001 Notice) (Ex 48)	St Louis	Modified Art 1(C)(4) by changing the terminal limits for the consolidated St Louis terminal-De Soto subdivision

D. BLET's Objections to UP's Interdivisional Service and Switching Limit Extension Notices

Despite this well-established past practice, BLET has recently taken the position in three arbitrations that UP voluntarily gave up its rights to use the expedited procedures contained in these agreements when it entered into the Merger Implementing Agreements Two arbitrators, Arbitrators Kenis and Perkovich, concluded that the Merger Implementing Agreements effectively nullified UP's Article IX rights by precluding UP from establishing any new interdivisional service that would require modification of the Merger Implementing Agreement Arbitrator Binau reached the opposite result, concluding that the Merger Implementing

Agreement did not modify or nullify UP's right to extend switching limits set in the Merger Implementing Agreements A review of these three decisions is set forth below.

1. The Kenis Award

Following the UP/SP merger, UP's daily train traffic through Memphis, Tennessee, nearly doubled To address the resulting congestion, UP served notice of its intent to establish new interdivisional service between North Little Rock and Memphis in 2003 [7] When the parties could not reach an agreement to establish the new service, UP submitted the matter to arbitration under Article IX of the 1986 Agreement BLET responded that the matter involved a dispute under Article I, § 11, of NYD, and Arbitrator Kenis was appointed to arbitrate the matter Kenis Award, Ex. 49, at 2-4

Despite the clear past practice of establishing new interdivisional service in territories covered by the Merger Implementing Agreements, BLET argued that UP had relinquished its right to establish new interdivisional service when it entered into those Agreements BLET based this argument on the Savings Clause and Applicable Agreement provisions of the North Little Rock, St Louis, and Kansas City Merger Implementing Agreements, which provide that "the provisions of the applicable Schedule Agreement will apply unless specifically modified herein," and that, where conflicts arise between the Schedule Agreements and the Merger Implementing Agreement, the "specific provisions of [the Merger Implementing Agreement] shall prevail " [8] Ex 49, at 16-17 BLET contended that, because all new interdivisional service

[7] For similar reasons, UP also sought to establish new interdivisional service in its Kansas City and St Louis hubs

[8] BLET also relied on side letters that provided that the Savings Clause "makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic Schedule Agreement, take precedence and not the other way around " Ex 7, Side Letter 6, Ex 10, Side Letter 20, Ex 18, Side Letter 10 These side letters go on to provide that "there are numerous other provisions in the designated collective bargaining agreement, including national agreements, which apply to the territory involved, and to the extent such provisions were not expressly modified or nullified, they still exist and apply It was not the intent of the Merger Implementing Agreement to

would cause a change in some provision of the Merger Implementing Agreements, UP had voluntarily given up its right to establish new interdivisional service by entering into those Agreements Id

UP disagreed. UP argued that its pre-existing rights under national agreements were only eliminated where "specifically modified" by the Merger Implementing Agreements Because the Merger Implementing Agreements did not specifically modify its Article IX rights to establish new interdivisional service, UP argued that those rights, which necessarily included the ability to change existing collective bargaining agreements such as the Merger Implementing Agreements through expedited negotiations and arbitration, continued to exist Id at 17-19

After a hearing, Arbitrator Kenis issued an inherently contradictory award. First, she agreed with UP and ruled that "we find the language contained in the merger implementing agreements is patently clear [UP]'s Article IX rights under the 1986 National Agreement were not expressly modified or nullified under the hub merger implementing agreement, and therefore they still exist and apply " Id at 20. However, relying on the exact same contractual provisions, Arbitrator Kenis then reached the exact opposite conclusion the Merger Implementing Agreements did modify UP's Article IX rights, in that UP could not exercise those rights to establish any interdivisional service that somehow changed any provision of the Merger Implementing Agreements Id at 22-24 Of course, the ability to modify existing collective bargaining agreements is the fundamental right granted by Article IX. Indeed, because all new interdivisional service necessarily changes some provision of the existing Agreement, Arbitrator

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either restrict or expand the application of such agreements " Id Thus, the side letters reiterate the language in the Savings Clause and do not change the meaning of the Agreements

Kenis' decision de facto eliminated UP's right to establish new interdivisional service or expand switching limits altogether [9]

The Kenis Award was appealed to this Board, however, due to illness of counsel, UP's appeal was filed out of time In its opposition to Board review, BLET argued that the Kenis Award was limited to the North Little Rock, Kansas City, and St Louis Merger Implementing Agreements, and that the Kenis Award therefore did not raise recurring and significant issues requiring Board resolution Ex 50, at 1-2. The Board did not reach the merits of UP's appeal, but instead refused to grant UP leave to file its appeal out of time. Union Pac Corp. – Control and Merger – Southern Pac R Corp., Finance Docket 32760, Sub. 43 (Arbitration Review) (Jan 21, 2005)

2. The Binau Award

Following the Kenis Award, UP continued to exercise its right to establish new interdivisional service and extend switching limits in the territories governed by other Merger Implementing Agreements See Table 1 For over two years, BLET did not object Indeed, in a brief filed with the Seventh Circuit, BLET continued to take the position that the Kenis Award was limited to the North Little Rock, St. Louis and Kansas City hubs Ex. 51, at 16-17.

In 2006, however, BLET changed its position In September of that year, UP served notice pursuant to Article II of the 1971 Agreement of its intent to extend the east switching limit at West Colton, California, by approximately 2 miles to address increased traffic in that terminal This proposal modified the Los Angeles Merger Implementing Agreement, which had

[9] Two of the Merger Implementing Agreements contain express reference to UP's Article IX rights Before Arbitrator Kenis, BLET argued that these provisions meant that UP had waived its Article IX rights at hubs governed by the other Agreements Arbitrator Kenis rejected this argument, Ex 49 at 21-22, and BLET did not raise it before Arbitrators Binau or Perkovich

established the switching limits of that terminal. Ex 8, at 8-9. The Los Angeles Merger Implementing Agreement, like the North Little Rock, Kansas City, and St. Louis Agreements, contains language stating that conflicts between prior agreements and the Merger Implementing Agreement are resolved in favor of the Merger Implementing Agreement. See Appendix B. UP and BLET could not agree on terms for the extended switching limits, and the matter was submitted to Arbitrator John Binau.

Backing away from its prior position, BLET argued that the logic of the Kenis Award applied with equal force in the Los Angeles hub. Binau Award, attached as Ex. 52, at 8-10. Specifically, BLET contended that the Agreement Coverage provision in the Los Angeles Merger Implementing Agreement, which provides "[e]xcept as specifically provided [in this Merger Implementing Agreement], the system and national [agreements] shall prevail," meant the same thing as the Savings Clause and Applicable Agreement provisions of the St. Louis, North Little Rock, and Kansas City Agreements. Thus, BLET argued that the Agreement Coverage provision of the Los Angeles Agreement precluded UP from using Article II to modify the Los Angeles Merger Implementing Agreement, which specifically established the terminal limits at West Colton. Id.

Arbitrator Binau declined to follow the Kenis Award, finding that there was no language in the Los Angeles Merger Implementing Agreement that specifically modified UP's Article II right to change the switching limits provided in the Merger Implementing Agreement Ex. 52, at 20-23. Arbitrator Binau rejected BLET's argument that the Agreement Coverage provision precluded UP from using the expedited procedures of Article II process to modify the Los Angeles Merger Implementing Agreement, and he permitted UP to extend the terminal limits in West Colton Id.

3. *The Perkovich Award*

Around the same time it was seeking to extend the switching limits in West Colton, UP served notice of its intent to establish new interdivisional service between Houston and three Texas cities: Angleton, Freeport, and Bloomington. Ex. 53. UP's proposed new service was necessary because of the great rail congestion in the Houston area. Under the relevant Merger Implementing Agreement (called the Houston Zones 3, 4, and 5 Merger Implementing Agreement), many UP crews in the Houston hub operate in turnaround pools, i.e., they depart their home terminal, take a train to a certain destination, and then pick up another train and return to the terminal from which they started. Ex. 6. Under the Hours of Service Law, however, these crews are limited to 12 hours of work, and once the 12-hour mark is reached, the crew must pull the train over at the next siding even if they have not completed their trip, and a relief crew must be driven to the train to complete the trip. 48 U.S.C. §§ 21101 et seq.

While this method of operation worked for several years, it no longer allows for the efficient movement of freight. As a result of the growth of rail traffic in Houston and the resulting congestion, the majority of crews are no longer able to complete the turnaround service within 12 hours. To address the resulting rampant delays, UP proposed new interdivisional service runs. Ex. 53. After unsuccessful attempts to negotiate an agreement under Article IX of the 1986 Agreement, UP's proposal was submitted to arbitration before Arbitrator Perkovich. Arbitrator Perkovich reviewed the language of the Houston Zones 3, 4, and 5 Merger Implementing Agreement and found that it was more like the language of the North Little Rock, Kansas City, and St. Louis Merger Implementing Agreements interpreted by Arbitrator Kenis than the Los Angeles Merger Implementing Agreement interpreted by Arbitrator Binau. Ex. 1, at 4. For this and no other reason, Arbitrator Perkovich adopted Arbitrator Kenis' decision, and

concluded that the Houston Zones 3, 4, and 5 Merger Implementing Agreement, while not expressly modifying or nullifying UP's Article IX rights, precluded UP from establishing new interdivisional service in the territory covered by that Agreement. Id.

Thus, there are now three arbitration awards that reach inconsistent conclusions. UP respectfully asks this Board to resolve this split in arbitral authority and to find that it has not given up its critical rights to establish new interdivisional service and extend switching limits. Thus, UP requests that the Board vacate the Perkovich Award.

ARGUMENT

A. This Board Has Jurisdiction to Review the Perkovich Award Because it is Based Solely on the Interpretation of a New York Dock Implementing Agreement

Pursuant to 49 C.F.R § 1115.8, the Board reviews decisions of NYD arbitrators under its Lace Curtain standard of review first announced in Chicago & N.W. Transp. Co. – Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Bhd. of Elec Workers v. ICC, 862 F 2d 330 (D.C. Cir. 1988). The Board's assertion of jurisdiction over such awards has been repeatedly upheld by the courts. Association of Am. R.R. v. STB, 162 F.3d 101 (D.C. Cir. 1998). This is so because the Board, by using arbitration under NYD, has effectively delegated decisionmaking thereunder to arbitrators. United Transp. Union v. Norfolk & W. Ry Co., 822 F.2d 1114, 1120 (D.C Cir. 1987) (NYD arbitrator awards are orders of the Board). The Board, however, administers NYD and therefore has the authority to review the decisions of its delegatees (the NYD arbitrators). International Bhd. of Elec. Workers, 862 F.2d 330.

Normally, the Board reviews decisions of arbitrators specifically appointed under Article I of NYD. Although his decision undeniably involves interpretation of a NYD Merger Implementing Agreement, Arbitrator Perkovich was technically appointed under Article IX of

the 1986 Agreement. Board precedent proves that this fact does not stand as an impediment to its review of the Perkovich Award.

In Grand Trunk W.R.R. Co. – Merger – Detroit & Toledo Shore Line R.R. Co., 7 I C.C.2d 1038 (1991), the Interstate Commerce Commission ("ICC") addressed the issue of whether it had jurisdiction to review an arbitration award issued by a Public Law Board ("PLB") established under § 3, Second, of the RLA, 45 U.S.C. § 153, Second. The dispute arose after Grand Trunk Western ("GTW") and UTU had entered into two NYD implementing agreements following the merger of the GTW and two other carriers. Both implementing agreements incorporated the terms of prior "equity assignment" agreements. When a dispute arose regarding UTU's rights under the implementing agreement and the incorporated equity assignment agreements, a PLB was created to resolve the dispute. The PLB found in favor of the UTU, and GTW appealed to the ICC. 7 I.C.C.2d at 1039.

UTU argued that the ICC had no jurisdiction because the award was issued by a PLB established pursuant to § 3, Second of the RLA, and that review was therefore available only in federal district court pursuant to RLA § 3, First (q), 45 U.S.C. § 153, First (q). The ICC rejected UTU's argument, concluding that NYD procedures (including review by the ICC) applied to NYD matters, while RLA procedures (including review by federal district courts) applied to RLA matters. Id. at 1043 The fact that the arbitration board had been set up as a PLB did not block ICC jurisdiction because "an arbitration panel established to consider a New York Dock issue . . . would properly operate under New York Dock procedures regardless of what it called itself." Id. Because the subject of the challenged award involved the meaning of NYD implementing agreements, the ICC had jurisdiction to review the PLB's award. Id.

Since Grand Trunk, this Board has reaffirmed that disputes regarding the meaning of NYD implementing agreements are resolved by arbitration "subject to appeal to the agency . . . ." Burlington N. Inc. & Burlington N.R.R. Co. – Control and Merger – Santa Fe Pac Corp. & Atchison, T.&S.F. Ry. Co., (Arbitration Review), STB Finance Docket No. 32549 (Sub. No. 23) (Sept. 23, 2002). BLET has embraced this position, arguing to this Board that "disputes involving the interpretation of any terms of [a UP] Hub Implementing Agreement" are subject to arbitration and review by the Board under NYD. Ex. 43, at 18-19.

Here, Arbitrator Perkovich (like Arbitrator Kenis) was presented with the threshold question of whether the relevant Merger Implementing Agreement precluded UP from establishing its proposed new interdivisional service. While Arbitrator Perkovich did not discuss whether this issue arises under NYD or the RLA, both Arbitrator Kenis and the BLET have acknowledged that it arises under NYD. In her Award, Arbitrator Kenis concluded that resolution of this threshold issue focused primarily on an analysis of the implementing agreements, as opposed to the 1986 Agreement, and that "the interpretation and application of merger implementing agreements falls within the ambit of Art. I, § 11 of the NYD conditions." Ex. 49, at 15. Similarly, BLET stated in its submission to Arbitrator Perkovich that the dispute does not "come under the purview" of the RLA unless and until it is first determined that UP could establish new interdivisional service in a territory covered by a NYD Merger Implementing Agreement Ex. 54, at 11.

Arbitrator Perkovich resolved this threshold issue in favor of BLET, concluding that the Houston Zones 3, 4, and 5 Merger Implementing Agreement precluded UP from establishing its proposed new interdivisional service. He based his decision entirely on his interpretation and application of a NYD Merger Implementing Agreement, never reaching the question of whether

UP's proposed new interdivisional service was proper under Article IX of the 1986 Agreement. Thus, under Grand Trunk, because the Perkovich Award is based on an interpretation of a NYD implementing agreement, it is subject to appeal to this Board.

B. This Appeal Raises Significant Issues of General Importance Regarding the Interpretation of New York Dock Implementing Agreements

Under its Lace Curtain standard, this Board reviews NYD arbitration awards that raise "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." 3 I.C.C.2d at 735. The Perkovich Award clearly qualifies for review under this standard.

In Burlington N., Inc. – Control and Merger – St. L.S.F. Ry. Co., 6 I.C.C.2d 351 (1990), the Board recognized that review is appropriate where an arbitrator has misinterpreted an implementing agreement, the same misinterpretation has occurred in the past, and it "may reoccur." Id. at 353. In contrast, the Board typically does not review awards interpreting non-standard implementing agreements that are limited to a single location, and involve circumstances not likely to recur. Grand Trunk, 7 I.C.C 2d at 1044.

As discussed above, BLET initially argued against Board review of the Kenis Award under this standard. BLET contended that the issue would not repeat itself because:

> The issue raised by UP involves only three of 16 [sic] Hub Implementing Agreements in effect on the UP as a result of the UP/SP merger. And those Agreements contain certain contractual provisions which are not in the remaining Hub Implementing Agreements or such agreements in general. The issue has not risen since the merger or the creation of the Little Rock/Pine Bluff, Kansas City and St. Louis Hubs by UP and, as we show later, is not likely to arise in those Hubs or elsewhere after.

Ex. 50, at 1.

BLET's forecast was, at best, wrong. BLET now takes the position that the Kenis Award should apply under all Merger Implementing Agreements, whether they contain the Agreement Coverage language, or the Savings Clause/Applicable Agreement language. Not only has BLET pressed this position with regard to new interdivisional service, it has expanded this argument to include extending switching limits. Ex. 52, at 8-10; Ex. 56 at 21-24. Thus, the issue raised herein implicates every Merger Implement Agreement throughout the entire UP system

Moreover, resolution of the issue to date has resulted in an arbitral split. Arbitrators Kenis and Perkovich found that, although the applicable Merger Implementing Agreements did not modify or nullify UP's right to establish new interdivisional service under Article IX, they effectively did so because UP could not use Article IX to implement any new interdivisional service that conflicted with the Merger Implementing Agreements. Arbitrator Binau, on the other hand, found that language having the same meaning in a different Merger Implementing Agreement did not affect UP's right to extend switching limits under Article II of the 1971 Agreement. As a result, UP is now confronted with a recurring dispute and an arbitral split of authority over the meaning of the Merger Implementing Agreements in effect between it and BLET. This is precisely the type of recurring and significant issue subject to Board review under Lace Curtain.

C. *Arbitrator Perkovich's Ruling that UP Gave Up its Right to Establish the Interdivisional Service at Issue Constitutes Egregious Error*

Under its Lace Curtain standard, the Board must vacate any arbitration award "when there is egregious error." American Train Dispatchers Ass'n v CSX Transp., Inc., 9 I.C.C.2d 1127, 1130-31 (1993). In Union Pac. R R. Co. v. STB, 358 F.3d 31 (D.C. Cir. 2004), the D.C. Circuit explained that an arbitrator commits "egregious error" whenever the award is "irrational,

wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact." Id at 37. While this standard sounds quite high, precedent establishes that Lace Curtain requires a searching review to determine if the award at issue is actually supported by the record. Thus, in Union Pac. R.R. Co. v. STB, the Court vacated a NYD arbitration award under this standard because the evidence deemed "pivotal" by the arbitrator did not actually support his conclusion. Id.

The same is true here. Arbitrator Perkovich's conclusion that the Houston Zones 3, 4, and 5 Merger Implementing Agreement eliminated UP's rights to establish new interdivisional service is completely unsupported by the language of or the parties' past practices under that Agreement. Specifically: (1) the Award draws an irrational and baseless distinction between the Agreement Coverage provision (found in the Merger Implementing Agreement before Arbitrator Binau) and the Savings Clause/Applicable Agreement provisions (found in the Merger Implementing Agreements before Arbitrators Kenis and Perkovich); (2) the Award adopts internally inconsistent reasoning from the Kenis Award stating that UP both had and had not modified its rights under the 1986 and 1971 Agreements by entering into the Merger Implementing Agreements; and (3) the Award grossly misinterprets the contract language, as evidenced by the parties' past practices thereunder. For these reasons, the Perkovich Award should be set aside.

1. The Perkovich Award Draws a Baseless Distinction Between the Language of the Los Angeles and the Houston Zones 3, 4, and 5 Merger Implementing Agreements

Arbitrator Perkovich was well aware that Arbitrators Kenis and Binau had reached different conclusions in the cases that had been presented to them. As noted above, his Award followed the Kenis Award. His sole rationale: that the language in the Merger Implementing

Agreements before him was more like the language before Arbitrator Kenis than the language before Arbitrator Binau. Ex. 1, at 4.

Arbitrator Perkovich's reliance on these alleged differences in contract language constitutes egregious error. While there are wording differences between the relevant agreements, it is impossible to conclude that the two variations of the language at issue were intended to have different meanings. Nine of the Merger Implementing Agreements, including the one before Arbitrator Binau, contain the "Agreement Coverage" language, which provides that "[e]xcept as specifically provided herein, the system and national collective bargaining agreements, awards and interpretations shall prevail." The other seven Agreements, including those before Arbitrators Kenis and Perkovich, contain the "Savings Clause," which provides that "the provisions of the applicable Schedule Agreement will apply unless specifically modified herein," and the "Applicable Agreement" clause, which provides that "[w]here conflicts arise, the specific provisions of this Implementing Agreement shall prevail."

These provisions cannot rationally be read to mean different things One says that "except as specifically provided herein," the 1986 and 1971 Agreements remain in effect The other says that the 1986 and 1971 Agreements remain in effect "unless specifically modified herein." These are two different ways of saying the exact same thing. Indeed, even BLET, in its written submission to Arbitrator Binau, specifically stated that these two different versions of the Merger Implementing Agreements meant the exact same thing. Ex. 55, at 21-24. Arbitrator Perkovich's attempt to justify his decision based on this meaningless difference in contract language is "wholly baseless" and "without foundation in reason and fact." Under Lace Curtain, the Perkovich Award must therefore be vacated.

2. *Arbitrator Perkovich Egregiously Erred By Adopting the Internally Inconsistent Reasoning of the Kenis Award*

Given that the differences in contract language cannot justify the split in arbitral authority, the question is whether Arbitrator Kenis' internally inconsistent reasoning, which Arbitrator Perkovich adopted, can survive this Board's review. As shown below, it cannot

The Perkovich and Kenis Awards purport to be based on the language of the Merger Implementing Agreements. That language, quoted above, simply provides that the 1986 and 1971 Agreements continue to apply "except as specifically modified" by the Merger Implementing Agreement. The Kenis Award admits that the Merger Implementing Agreements **do not modify** UP's Article IX rights to institute new interdivisional service. Ex. 49, at 20. However, after making this finding, the Award then turns around and inconsistently states that those Agreements **do modify** UP's right to establish any new interdivision service that would require a change to any provision of the Merger Implementing Agreements. Ex. 49, at 22-25.

This internally inconsistent analysis (the Merger Implementing Agreements do not modify UP's rights, but they do modify UP's rights) suffers from a fatal flaw: it ignores the very nature of the rights UP obtained under these national agreements. In all cases, new interdivisional service and extended switching limits necessarily changes existing collective bargaining agreements. The fundamental right established by the 1986 and 1971 Agreements is the right to modify existing collective bargaining agreements establishing routes, home and away-from-home terminals, and terminal limits, through an expedited process of negotiation and (if necessary) arbitration, so that these operational changes can be quickly made.

In fact, UP has repeatedly utilized its Article IX and Article II rights to change the Merger Implementing Agreements numerous times, including Agreements containing the exact

same language as those before Arbitrators Kenis and Perkovich. Table 1 above sets out numerous examples of these actions. For instance, in 1998, UP used Article II of the 1971 Agreement to extend terminal switching limits set by the Longview Merger Implementing Agreement, even though that Agreement contains the exact same Applicable Agreement and Savings Clause provisions contained in the Houston Zones 3, 4 & 5 Merger Implementing Agreement. Compare Ex. 9, Arts. V(a) and IX(a), with Ex. 6, Arts. II(a) and VI(a). In 2000 and 2001 respectively, UP used Article IX of the 1986 Agreement to modify the Houston Zones 1 & 2 Merger Implementing Agreement and the St. Louis Merger Implementing Agreement, both of which again contain the exact same Applicable Agreement and Savings Clause provisions at issue before Arbitrators Kenis and Perkovich. Compare Ex. 5, Arts. II(a) and VI(a), and Ex. 18, Arts. IV(a) and VIII(a), with Ex. 6, Arts. II(a) and VI(a).

Consistent with this past practice, the Kenis Award (adopted by Arbitrator Perkovich) directly concluded that UP's Article IX rights were not modified or nullified by the Merger Implementing Agreements. Specifically, Arbitrator Kenis held "we find the language contained in the merger implementing agreements is **patently clear**. [UP]'s Article IX rights under the 1986 National Agreement were not expressly modified or nullified under the hub merger implementing agreement, and therefore they still exist and apply." Ex. 49, at 20 (emphasis added). Of course, the fundamental right UP has under Article IX is the ability to modify existing Merger Implementing Agreements through expedited negotiation and (if necessary) arbitration Thus, Arbitrator Kenis' conclusion was that UP's right to alter those Agreements had not been specifically modified or nullified.

This should have been the end of the analysis. The Applicable Agreement/Savings Clause provisions of the Merger Implementing Agreements state that the 1986 and 1971

Agreements continue in effect except where "specifically modified" by the Merger Implementing Agreements Once Arbitrator Kenis concluded that those rights were "not expressly modified or nullified," those rights necessarily continued to exist.

However, Arbitrator Kenis did not end her analysis at that point. Instead, she went on to directly contradict her earlier finding that the Merger Implementing Agreements **did not** modify UP's Article IX rights, finding that those Agreements **did** modify UP's Article IX rights where the new interdivisional service would change any provision of a Merger Implementing Agreement. Ex. 49, at 22-25. It is impossible to reconcile these inherently contradictory conclusions. On page 20 of her Award, Arbitrator Kenis specifically found that the Merger Implementing Agreements did not "modify or nullify" UP's Article IX rights. Those non-modified rights necessarily include the right to change existing Merger Implementing Agreements; indeed, the ability to change existing agreements through expedited negotiations and (if necessary) arbitration is the fundamental right granted to UP under Article IX. Thus, the finding (Ex. 49, at 20) that UP **had not** "modified or nullified" that right, is completely inconsistent with the finding (id at 22-25) that UP **had** nullified its right to use the expedited process of Article IX to change Merger Implementing Agreements Indeed, because every new interdivisional service will violate some provision of a Merger Implementing Agreement, just as every extended switching limit will violate some provision of a Merger Implementing Agreement, the internally inconsistent conclusion of the Kenis Award effectively eliminates UP's crucial rights to make those operational changes under any Merger Implementing Agreement.

Such a fundamental internal inconsistency, by its very nature, constitutes egregious error, requiring that the Award be vacated General Chem Corp. v. U.S., 817 F.2d 844, 855 (D.C. Cir.

1987) (internal inconsistencies in ICC ruling requires vacating decision); HRH Const., L.L.C. v. Local No. 1, Int'l Union of Elevator Constructors, 2005 WL 31948, at *6 (S.D.N.Y. 2005) (recognizing that an inherently contradictory award should not be confirmed, even under the extraordinarily deferential standard applied in reviewing labor arbitration awards); Air Line Pilots Ass'n v. FAA, 3 F.3d 449, 450 (D.C. Cir 1993) (Department of Transportation's decision that certain employees did not lose their jobs as a result of deregulation pursuant to the Airline Deregulation Act, and were thus not eligible for certain unemployment benefits vacated because it was "internally inconsistent").

3. *Arbitrators Perkovich and Kenis Egregiously Erred in Interpreting the Merger Implementing Agreements and Ignoring the Parties' Past Practices Thereunder*

In an apparent attempt to explain her inconsistent award, as well as her decision to ignore the parties' past practices, Arbitrator Kenis found that the "plain and unambiguous language" of the Merger Implementing Agreements "affords no other conclusion" than that UP intended to give up its rights under Article IX to modify a Merger Implementing Agreement. Ex. 49 at 25. Arbitrator Kenis offered no explanation for concluding that the language was unambiguous except to state that the language is unambiguous. Arbitrator Perkovich, in adopting the Kenis Award, made no attempt to support this finding

An agreement is legally ambiguous whenever it is "admitting of two or more meanings [or] of being understood in more than one way . . ." International Union, United A.A. & A.I.W. v. Mack Trucks, Inc., 917 F.2d 107, 111 (3rd Cir 1990) (internal citations omitted). The "words of the agreement, alternative meanings suggested by counsel, and extrinsic evidence offered in support of those meanings" must be considered to determine whether "the terms of the contract are susceptible of different meanings." Id. (internal citations omitted).

Under this standard, the conclusion of the Perkovich and Kenis Awards that UP unambiguously gave up its Article IX rights is "wholly baseless" and "without reason in fact or law." As quoted above, the Merger Implementing Agreements (in both iterations of the relevant language) provide that UP's Article IX and Article II rights continue to exist except as "specifically" modified or provided in the Merger Implementing Agreements. In her Award (Ex. 49, at 20), Arbitrator Kenis concedes that UP's Article IX rights "were not expressly modified or nullified" by the Merger Implementing Agreements. Despite this conclusion, Arbitrator Kenis then finds that UP **unambiguously** gave up its ability to exercise its Article IX rights where to do so would modify a Merger Implementing Agreement. This conclusion again ignores the fact that the fundamental right that UP has under Article IX is the power to use expedited negotiation and (if necessary) arbitration to modify existing agreements to establish new interdivisional service. It also again ignores that fact that every new interdivisional service will modify some provision of a Merger Implementing Agreement. Given these facts and the fact that the Merger Implementing Agreements do not "specifically modify" UP's Article IX and Article II rights, these contractual provisions are certainly susceptible to the interpretation given them by UP. The finding that the only reasonable way to read the Merger Implementing Agreements is to waive these crucial rights is wholly baseless, and therefore egregiously wrong.

In fact, UP's interpretation of the Merger Implementing Agreements as permitting it to continue to exercise its Article IX and Article II rights is the only reasonable one. The Merger Implementing Agreements (in both iterations of the crucial language) provide that UP's rights under the 1986 and 1971 Agreements continue except as "specifically modified" or "specifically provided" in the Merger Implementing Agreement. Even Arbitrator Kenis (Ex. 49, at 20) concedes that no such specific language exists.

Even if the language of the Merger Implementing Agreements were not clear enough, the past practices of the parties under those Agreements completely eliminate any potential doubt about their intent. Indeed, one of the most egregious errors of the Kenis Award (adopted by Arbitrator Perkovich) is that it fails to address those undisputed past practices. The law is clear that a past practice can become a term of the parties' collective bargaining agreement Detroit & T.S.L.R.R., 396 U.S. at 149 (where a practice has continued for a sufficient amount of time with the knowledge and acquiescence of the parties, it becomes an implied term of the parties' agreement). This basic principle of labor contract interpretation applies equally to RLA collective bargaining agreements, Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc., 655 F.2d 155, 157 (8th Cir 1981) (established past practice by the parties involves a "continuity, interest, purpose, and understanding which elevates a course of action to an implied contractual status"), and to NYD implementing agreements. CSX Corp. – Control – Chessie Sys., Inc., 1995 WL 717122 (ICC Dec. 7, 1995).

Here, Table 1 lists a large number of negotiated or arbitrated agreements establishing new interdivisional or enhanced customer service, and extending switching limits. All of them involved the use of the 1986 and 1971 Agreements (as well as the 1996 enhanced customer service agreement) to alter the terms of a Merger Implementing Agreement, many involve actions taken under Agreements containing the **exact same language** as those before Arbitrators Kenis and Perkovich. While all of these examples are meaningful (and some are discussed above), UP will address three additional examples herein.

First, on August 17, 1998, UP served notice of its intent to establish interdivisional service under Article IX of the 1986 Agreement from a new home terminal at Beaumont, Texas. This portion of the UP operates under the Houston Zones 1 and 2 Merger Implementing

Agreement, Ex. 5, which contains the **exact same** contractual language that was at issue in the Perkovich Award. As is true in the present dispute, UP's proposed interdivisional service conflicted with the terms of the relevant Merger Implementing Agreement. Specifically, the new service modified Article I of that Merger Implementing Agreement by establishing Beaumont as a home terminal, Ex. 43, at 1, whereas the Merger Implementing Agreement established Houston as the home terminal. Indeed, this same type of conflict – establishing new runs and moving home terminals – was the basis for Arbitrators Kenis' and Perkovich's rejections of the new interdivisional services at issue in those cases. Ex. 1, at 4-5; Ex. 49, at 25.

Notwithstanding this conflict, UP and BLET submitted the proposed interdivisional service to arbitration under Article IX of the 1986 National Agreement. In the arbitration, BLET made a crucial admission: that "pursuant to Article IX and a long line of Arbitral Awards, the Carrier has the right to establish new interdivisional train service." Ex. 43, at 1 [10] At no point in these proceedings did BLET ever suggest that the Merger Implementing Agreement in any way limited UP's Article IX rights. In the end, the arbitrator imposed the terms and conditions for interdivisional service proposed by UP in the first instance. Those terms directly conflicted with, and therefore modified, the Houston Zones 1 and 2 Merger Implementing Agreement.

Second, in 1998, UP served notice of its intent to extend the eastern switching limit for the Longview terminal pursuant to Article II of the 1971 Agreement. The Longview Merger Implementing Agreement, Ex. 9, again contains the **exact same** contractual language as the Merger Implementing Agreements before Arbitrators Kenis and Perkovich. UP's proposed switching limit extension clearly conflicted with the terms of the Longview Merger

[10] The fact that BLET itself interpreted the Merger Implementing Agreements to permit UP to utilize Article IX to modify those Agreements provides further proof that Arbitrator Kenis' finding that those Agreements unambiguously took away that right is egregiously wrong

Implementing Agreement Specifically, UP proposed to extend the eastern switching limit of the Longview termination to Mile Post 85. Ex. 37 However, Article I(B)(8) of the Longview Merger Implementing Agreement provided that the "terminal limits of Longview shall extend between Mile Post 88.5 and 96.2 . . . ." Ex. 9, at 7. Notwithstanding this conflict, BLET agreed to extend the switching limit. Ex. 37. At no time did BLET contend that UP was prohibited from making this change.

Finally, in 2005 (after the Kenis Award was issued), UP served notice of its intent to establish enhanced customer service for Ameren UE pursuant to Article IX of the 1996 Agreement. This portion of the UP operates under the St. Louis Merger Implementing Agreement, Ex. 18, which was one of the Merger Implementing Agreements specifically addressed in the Kenis Award. As is true in the present dispute, UP's proposed enhanced customer service conflicted with the terms of the relevant Merger Implementing Agreement. Article I(C)(4) of the St. Louis Merger Implementing Agreement provided that terminal limits for the consolidated St. Louis terminal are at Mile Post 10.8 for the DeSoto subdivision. Ex. 18, at 16. UP's proposal, however, modified that provision and extended the terminal limit to Mile Post 17.4. Ex. 48, at 1. Initially, BLET objected to the proposal, but eventually withdrew its opposition. Accordingly, UP continues to operate this enhanced customer service today.

Arbitrators Perkovich and Kenis completely ignore and fail to explain why this long-standing past practice, occurring under Agreements containing the identical language to the Agreements before them, is not controlling. The ICC's decision in CSX Corp. – Control – Chessie Sys., Inc., 1995 WL 717122 (ICC Dec 7, 1995), illustrates the egregious nature of this error. In that case, the Board looked to past practice despite a seemingly clear contractual provision. The parties had entered into a NYD implementing agreement that provided that

"[t]his agreement shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended." Id at *8. Subsequently, CSX attempted to utilize the procedures of Article I, § 4, of NYD to attempt to change that agreement so that it could carry out a later ICC-approved control transaction. The affected unions objected, claiming that CSX had given up its right to change the implementing agreement through NYD. Despite the seemingly clear contract language requiring changes to be made only through RLA procedures, CSX pointed out it had entered into "five implementing agreements where representatives of labor allegedly did not argue that the language required bargaining under the RLA to implement transactions requiring Commission approval." Id. In each of these cases, "the union did not object to the expansion of the coordination of operations under New York Dock, notwithstanding the presence of similar language referring to the RLA in the prior implementing agreements establishing the coordinations that were expanded." Id. at *13 n.22.

The ICC ruled for CSX. Specifically relying on the parties' past practice to interpret the plain language of the implementing agreement, the ICC held that the five implementing agreements cited by CSX showed the union's interpretation of that provision to be incorrect. Id. at *9. The fact that the text of the agreement indicated a different result did not matter; the past practice revealed the true intent of the parties.

CSX is directly applicable in the present case. Indeed, it is the parties' past practice that makes the intent of the Merger Implementing Agreements most clear. If the parties intended the Merger Implementing Agreements to eliminate UP's rights (as held by Arbitrators Kenis and Perkovich), this past practice would not have occurred As in CSX, the parties' intent in entering into the Merger Implementing Agreements is revealed by the fact that, after those Agreements were implemented, UP and BLET repeatedly negotiated and arbitrated the terms of new

interdivisional service and new switching limits, despite the fact that the new interdivisional service changed the terms of those Merger Implementing Agreements. The failure of Arbitrators Kenis and Perkovich to recognize this fact constitutes egregious error. The Perkovich Award must therefore be vacated.

In the end, if the Perkovich and Kenis Awards stand, the real victims will be the shippers and the public. As it stands now, in four of its hubs, UP is, for the most part, forced to operate in a manner that it designed in 1997-98. Not surprisingly, over the past decade, traffic patterns and other market conditions have changed. Demand for rail service has grown tremendously. The Perkovich and Kenis Awards strip UP of its ability to respond to these events, robbing UP of its ability to move freight efficiently. If these Awards are expanded to the entire UP system (or a larger part of it), commerce will be gravely affected. As stated above, this is the reason that the PRC recommended that interdivisional service be established through expedited negotiation and arbitration, rather than by traditional collective bargaining. Arbitrator Perkovich (like Arbitrator Kenis) ignores this crucial fact. As a result, his decision should be vacated.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, UP respectfully requests that the Board grant review of and vacate Arbitrator Perkovich's Award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon Gilbert Gore, 1448 MacArthur Avenue, Harvey, Louisiana 70058, by Federal Express overnight delivery, this 21st day of February 2008.

_____

APPENDIX A

MERGER IMPLEMENTING AGREEMENTS IN EFFECT BETWEEN THE UP AND BLET

- CNW Merger Implementing Agreement (June 6, 1996) (Ex. 2)[11]
- Dallas/Ft. Worth Hub Merger Implementing Agreement (Apr. 29, 1999) (Ex. 3)
- Denver Hub Merger Implementing Agreement (Apr. 8, 1997) (Ex. 4)
- Houston Zones 1 & 2 Hub Merger Implementing Agreement (Jan 17, 1997) (Ex. 5)
- Houston Zones 3, 4, & 5 Hub Merger Implementing Agreement (Apr. 23, 1997) (Ex. 6)
- Kansas City Hub Merger Implementing Agreement (July 2, 1998) (Ex. 7)
- Los Angeles Hub Merger Implementing Agreement (Nov. 18, 1998) (Ex. 8)
- Longview Hub Merger Implementing Agreement (May 14, 1997) (Ex 9)
- North Little Rock Hub Merger Implementing Agreement (Oct. 9, 1997) (Ex. 10)
- Portland Zone 1 Hub Merger Implementing Agreement (Aug. 13, 1998) (Ex. 11)
- Portland Zones 2 & 3 Hub Merger Implementing Agreement (Feb. 28, 2001) (Ex. 12)
- Roseville Hub Merger Implementing Agreement (Feb 24, 1998) (Ex. 13)
- Salina Hub Merger Implementing Agreement (July 22, 1998) (Ex. 14)
- Salt Lake City Hub Merger Implementing Agreement (April 9, 1997) (Ex. 15)
- San Antonio Hub Merger Implementing Agreement (Jan. 6, 1999) (Ex. 16)
- Southwest Hub Merger Implementing Agreement (June 15, 1999) (Ex. 17)
- St. Louis Hub Merger Implementing Agreement (Apr. 15, 1998) (Ex. 18)

[11] Given the length of the Merger Implementing Agreements, only the relevant sections are attached

APPENDIX B

CONFLICT LANGUAGE CONTAINED IN MERGER IMPLEMENTING AGREEMENTS IN EFFECT BETWEEN THE UP AND BLET

	Agreement Coverage Except as specifically provided [in this Merger Implementing Agreement], the system and national [agreements] shall prevail.	**Applicable Agreements** Where conflicts arise, the specific provisions of this [Merger] Implementing Agreement shall prevail	**Savings Clause** The provisions of the applicable Schedule Agreement will apply unless specifically modified herein	**Side Letter** [The Savings Clause] makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic Schedule Agreement, take precedence and not the other way around
Dallas/Ft. Worth	Art. VI.F			
Denver	Art. IV.C			
Houston Zones 1 & 2		Art. II.A	Art. VI.A	
Houston Zones 3, 4, & 5		Art. II.A	Art. VI.A	
Kansas City		Art. IV A	Art VIII A	Side Letter No. 9
Los Angeles	Art. VI.C			
Longview		Art. V.A	Art. IX.A	
North Little Rock		Art. IV.A	Art. VIII A	Side Letter No. 20

	Agreement Coverage Except as specifically provided [in this Merger Implementing Agreement], the system and national [agreements] shall prevail	**Applicable Agreements** Where conflicts arise, the specific provisions of this [Merger] Implementing Agreement shall prevail	**Savings Clause** The provisions of the applicable Schedule Agreement will apply unless specifically modified herein	**Side Letter** [The Savings Clause] makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic Schedule Agreement, take precedence and not the other way around
Portland Zone 1	Art. VI.C			
Portland Zones 2 & 3	Art VI.C		Art. X.A[12]	
Roseville	Art. VI.C			
Salina		Art. IV.A	Art. VII.A	Side Letter No. 7
Salt Lake City	Art. IV.C			
San Antonio	Art. VI.F			
Southwest	Art. VI.C			
St. Louis		Art. IV.A	Art. VIII A	Side Letter No. 10
Chicago		Art. VIII[13]		

[12] The Savings Clause in the Portland Zones 2 & 3 Hub Merger Implementing Agreement contains a slightly modified Savings Clause, which provides "[i]n the event the provisions of this Agreement conflict with existing *collective bargaining agreement provisions, rules and/or practices, the provisions of this Agreement shall prevail.*"

[13] The provision in the UP/CNW Merger Implementing Agreement contains a slightly modified Applicable Agreement provision, which provides "[s]hould the provisions of any BLE Collective Bargaining Agreement conflict with the terms and intent of this Agreement, this Agreement will apply."